

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE

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December 10, 1993

AO-93-24

MARY F. McTIGUE
DIRECTOR

Joseph V. Maruca, Esq.
Sykes and Cole
Post Office Box 1358
Hyannis, Massachusetts 02601

Re: Solicitation of Contributions by Public Employee

Dear Mr. Maruca:

This letter is in response to your August 19, 1993 request for an advisory opinion.

You have stated that you are a call fire fighter with the Town of Sandwich Fire Department. You are not required to work any specific hours or respond to any particular emergency. You are paid \$4.31 per hour when you do respond to an emergency or attend a drill. You set your own hours, and your total annual pay is approximately \$250-\$300.

You are also a Library Volunteer for the Sandwich Public Library. You receive no pay, stipends or reimbursement. You work no specific hours for the Library.

You are considering soliciting contributions either for yourself or for another candidate for public office.

You have posed several questions for which we provide detailed answers below. A short answer to your principle concerns, however, can be provided here: as a call fire fighter, you are prohibited by M.G.L. c. 55, s. 13 from soliciting political contributions. If you refuse compensation, you will not be subject to the prohibitions of section 13. As a library volunteer you are not subject to section 13.

1. Does M.G.L. c. 55 prevent you from soliciting political contributions for your campaign if you should decide to run for office, or from soliciting political contributions on behalf of another candidate?

Section 13 of M.G.L. c. 55 states, in pertinent part, that:

No person employed for compensation, other than an elected officer, by the commonwealth or any county, city, or town shall directly or indirectly solicit or receive any gift, payment, contribution, assessment, subscription or promise of money or other thing of value for the political campaign purposes of any candidate for public office or of any political committee, or for any political purpose whatever, but this section shall not prevent such persons from being members of political organizations or committees. . . (emphasis added).

Section 13 prohibits any person employed for compensation by the Commonwealth or any political subdivision thereof from directly or indirectly soliciting or receiving contributions for any political purpose. The only exception to this general prohibition is a person who holds elective office. It is the opinion of this office that any person who is paid directly any sum by the Commonwealth, or a political subdivision thereof, to perform services and who is not an independent contractor falls within the prohibitions of section 13 of M.G.L. c. 55.¹

An "independent contractor" is "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. . . ." Black's Law Dictionary (5th edition) 1979, quoting Restatement, Second, Agency, s. 2. This office has advised that an attorney engaged in the private practice of law who provides some services for government agencies was an independent contractor. See AO-88-19. The attorney did not report to any state officer or employee concerning the manner in which he performed his work, and the attorney made all decisions concerning the manner and way in which litigation was conducted. The attorney, like yourself, performed his work according to his own schedule. Unlike your situation, however, when the attorney did his work, he was not under the control of the governmental client. In your role as a fire fighter, you can decide when you work, but I assume that when you work, you are under the control and supervision of others.

In summary, you receive compensation from the Town of Sandwich and you are not an independent contractor. Therefore, it is this office's opinion that you are "employed for compensation" and subject to the provisions of section 13 of M.G.L. c. 55. You would thus be prohibited from soliciting or receiving money on behalf of your own candidacy for public office. You would also be prohibited from soliciting or receiving money on behalf of another candidate. A political committee established on your behalf would be able, however, to solicit and receive monies for your campaign, provided no monies were solicited or received from parties with whom you have official business as a call fire fighter.

1. In earlier opinions, this office has advised that small levels of compensation were "de minimus" and, therefore, did not rise to the level of compensation. See AO-88-18 (\$1,000 annual payment was "de minimus") and AO-89-10 (\$200 annual payment was "de minimus"). However, these opinions have been superseded by more recent opinions which have advised that persons employed by the commonwealth or one of its political subdivisions are considered compensated if they are paid "any sum" for their services. See AO-90-05 and AO-90-10. You would not be considered compensated if you are merely reimbursed for actual expenses incurred or on a "per diem" basis provided the per diem rate reasonably reflects actual expenses and can be substantiated. See AO-91-09.

2. If you become a volunteer fire fighter, rather than a call fire fighter, by disclaiming the "pay" and continuing your fire fighting without receiving any pay except for reimbursement for actual expenses, would Chapter 55 prevent solicitation of political contributions for your candidacy or for another person's candidacy?

It is important to reiterate the fundamental purpose of Section 13 of Chapter 55. Section 13 is designed to prevent corruption or the appearance of corruption of public employees within the context of political fundraising efforts. In a recent opinion, this office advised the Chairman of the Massachusetts Board of Registration in Medicine that he could not avoid the applicability of section 13 by foregoing all compensation. See AO-92-07. In his request for an advisory opinion, the Chairman indicated that he would forego compensation, specifically allocated by the statute creating the Board of Registration, in the amount of thirty-five dollars per day. Under these circumstances this office concluded that even if compensation were renounced, the appearance of corruption would still exist. We reasoned that an appointed official should not be able to solicit political contributions simply because he or she has sufficient wealth to enjoy the luxury of foregoing salary. We concluded that such a result would defeat the very purpose of the statute.

The facts which led to this office's conclusion in AO-92-07 can be distinguished from the facts which you present in your letter. We understand that the Fire Department submits a request for funds to the Town Meeting which does not specifically list salary for call fire fighters as a line item. No general law requires payment of call fire fighters at a particular rate. Although you receive compensation, your service is akin to that of volunteer fire fighters. Finally, as a call fire fighter, you do not have other public employees under your supervision.

The foregoing considerations lead to the conclusion that a call fire fighter who refuses compensation is not subject to the prohibitions of section 13. Therefore, if you renounce your salary and become a volunteer fire fighter you will be able to solicit contributions for your campaign, or for the campaign of another person. You should be careful, however, that your actions do not violate other laws, such as M.G.L. c. 268A, the conflict-of-interest law, which is enforced by the State Ethics Commission, or policy considerations of the Town, which might restrict such activity.

3. Does Chapter 55 prevent your solicitation of political contributions on your behalf or on behalf of other candidates if you become a West Barnstable Fire District Call Fire Fighter? If yes, how is it that a Fire District is a "county, city or town" under the statute, in light of the usual rule that you cannot expand the meaning of words in criminal statutes or add words to criminal statutes with the same ease that you might with a civil statute?

You have stated that you have filed an application to become a call fire fighter for the West Barnstable Fire Department, which is operated by the West Barnstable Fire District. If you become a call fire fighter in West Barnstable, you will be paid an hourly rate and will not be required to respond to any particular emergency.

Again, if you are compensated, chapter 55, s. 13 would prevent your solicitation of political contributions. Fire districts are governed by M.G.L. c. 48, s. 60, et. seq. A fire district is "considered a municipal agency for purposes of chapter 268A [the State's conflict-of-interest law], and each part-time fire fighter who performs professional services for the district on a part time, intermittent, or consultant basis will be considered a special municipal employee." M.G.L. c. 48, s. 90. With limitations, special municipal employees are subject to the provisions of the conflict-of-interest law. See, e.g., sections 17 and 20 of chapter 268A.

Although the legislature, in enacting section 90 of chapter 48, did not expressly state that district fire fighters would also be subject to the provisions of chapter 55, the inference is inescapable. The rationale underlying chapter 48 is that fire districts are analogous to municipal corporations and therefore those who work for fire districts must also be subject to ethical constraints imposed on municipalities. See also Cohen v. Board of Water Commissioners, Fire District No. 1, South Hadley, 411 Mass. 744, 748 (1992) (to some extent, with its specialized public function, a fire district can be considered a municipal agency). Moreover, the Legislature has taken an expansive view in its definition of public employees covered by c. 55.²

4. If you refuse payment for fire fighting services and the Fire District agrees that you can serve without pay, can you volunteer your services to the Fire District and engage in political fundraising?

See discussion following your second question. If you refuse payment for fire fighting services and the Fire District agrees that you can serve without pay, you can engage in political fundraising while serving as a volunteer.

5. Does your activity as a Library Volunteer prevent you from soliciting political contributions on your own behalf or on behalf of another candidate?

You have stated that you serve as a "Library Volunteer" at the Sandwich Public Library. You receive no pay, stipends or reimbursements. You are covered by the Town's insurance for any injuries which you might receive on Library property. You work no specific hours.

² The Legislature has stated that "[a]ll officers, directors and employees of state authorities and all trustees and employees of state institutions of higher education" are subject to c. 55. See Section 179 of Chapter 653 of the Acts of 1989.

As noted above, if you are a volunteer worker, you may engage in political fundraising to the extent permitted by the campaign finance law. In particular, you should be alerted to the following provisions of M.G.L. c. 55:

Section 14 of M.G.L. c.55 states: "No person shall in any building or part thereof occupied for state, county or municipal purposes demand, solicit or receive any payment or gift of money or other thing of value for the purposes set forth in section thirteen."

Section 15 of M.G.L. c.55 states:

No officer, clerk or other person in the service of the commonwealth or of any county, city or town shall, directly or indirectly, give or deliver to an officer, clerk or person in said service, or to any councillor, member of the general court, alderman, councilman or commissioner, any money or other valuable thing on account of, or to be applied to, the promotion of any political object whatever.

Even if you are not compensated, you may be limited in you fundraising activities by section 15. Whether you are turns on the definition of "persons in the service." This office has previously advised that the phrase "was intended to include any elected, appointed or other person, regardless of compensation, who is providing significant public services to the commonwealth or one of its subdivisions or authorities." See AO-92-01. The office has stated that "the fact of official appointment or election to an office is an important, if not essential, criterion in determining whether someone is a 'person in the service' for purposes of section 15." Id. For example, a part-time consultant receiving \$1,500 to \$2,000 from a municipality was a "person in the service" of the town since there was an official contractual relationship. On the other hand, unappointed, volunteer High School PTO members would probably not be "persons in the service." (Compare AO-92-01 and AO-85-04).

To serve as a volunteer fire fighter, your appointment must be approved by the chief of the fire department, and in the case of the Town of Sandwich, the Board of Selectmen make the appointment. Moreover, you must meet certain requirements prior to being appointed. On the other hand, to serve as a Library Volunteer, you need not be appointed and there are no requirements which limit your ability to serve in that capacity. Therefore, although your service as a library volunteer does not subject you to the campaign finance laws, as a volunteer fire fighter, you are a "person in the service" of the Town of Sandwich or the West Barnstable Fire District.

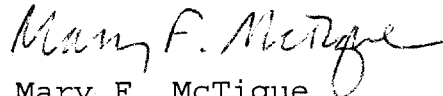
Should you provide fire fighting services on a voluntary basis, as discussed above in the answers to questions 2 and 4, you would still be considered to be "a person in the service of" a town or subdivision of the Commonwealth, and section 15 would preclude you from delivering any monies or checks directly to any other "person in the service" or incumbent office holder, including other town or fire district employees.

A political committee established on behalf of a candidate could, however, deliver contributions to such persons. As a practical matter, this conclusion would appear to preclude you from acting in the capacity of treasurer of a political committee if you remain a volunteer fire fighter, since any person in the service of the commonwealth or any of its subdivisions, including the Town of Sandwich and the West Barnstable Fire District, would be prohibited from giving any money or other things of value to you, either directly or indirectly. See AO-92-16.

This opinion has been rendered solely on the basis of representations made in your letter and in subsequent telephone conversations with my staff, the assumptions stated above, and solely in the context of M.G.L. c.55.

I have included a copy of a brochure for public employees, for your information. Please do not hesitate to contact this office should you have additional questions.

Very truly yours,


Mary F. McTigue
Director

enclosure
MFM/wp